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IN THE

Supreme Court of the United States

PT PERTAMINA (PERSERO), F/K/A/ PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE REPUBLIC OF INDONESIA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Republic of Indonesia ("Republic") moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for Petitioner has consented to the filing of this brief, but counsel for the Respondent has withheld consent.

The Republic is a sovereign state that has a direct interest in this case for several reasons. It is the sole owner of Petitioner PT Pertamina (Persero) ("Pertamina")[1] and, by law, has directed Pertamina to help manage on the nation's behalf the exploration, development, and exploitation of Indonesia's oil and gas resources. As a state-owned company, Pertamina must turn over revenues it derives from the sale of Indonesia's oil and gas to the Indonesian treasury for the welfare of the Indonesian people. The Republic owns most of the hundreds of millions of dollars in oil and gas revenues in trust accounts in the United States that Respondent Karaha Bodas Company L.L.C. ("KBC") has restrained in its indiscriminate efforts to enforce its arbitral award against Pertamina.

For purposes of the Republic's appearance as an *amicus curiae* before this Court, however, its most pressing interest is to vindicate its status as a co-equal signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *codified in* the Federal Arbitration Act at 9 U.S.C. §§ 201–208 ("New York Convention" or "Convention"). Applying governing Indonesian law to interpret the arbitration

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[1] Pertamina was formerly known as Perusahaan Pertambangan Minyak Dan Gas Bumi Negara.

clause at issue, the Central Jakarta District Court ("Jakarta Court") determined that Indonesia has primary jurisdiction, *i.e.*, competence to set aside or annul the arbitral award issued in favor of KBC, within the meaning of Article V(1)(e) of the New York Convention. In August 2002, the Jakarta Court issued an order annulling the award as a matter of public policy, reasoning that under Indonesian principles of contract interpretation the arbitration agreements clearly manifest the parties' choice of Indonesian law to govern the arbitration.

The Fifth Circuit disregarded the decision of the Jakarta Court, however, holding that Switzerland and not Indonesia had primary jurisdiction under the Convention. The Court of Appeals rested its decision on a presumption, unsupported in the language of the Convention, "that designating the place of the arbitration also designates the law under which the award is made." Pet. App. 22a. Because the parties selected Switzerland as the place of the arbitration proceedings, the Fifth Circuit inferred that Swiss law governed the arbitration and that Switzerland had primary jurisdiction.

The Fifth Circuit's decision merits review because it conflicts with this Court's precedents and with decisions of other federal courts of appeals. Even more fundamentally, the Fifth Circuit's decision warrants review because it raises serious issues for U.S. foreign relations. By confirming an arbitral award already set aside by the Jakarta Court, on the basis of a presumption and without conducting any reasoned choice of law analysis, the decision below presents an affront to the Republic. The Jakarta Court's decisions recognizing its own jurisdiction and annulling the arbitral award are entitled to deference under the terms of the New York Convention and the principle of international comity. Yet the Fifth Circuit cast aside the Jakarta Court's determination of its own jurisdiction, along with its order

setting aside the arbitral award in accordance with Indonesian law and public policy and in full compliance with the terms of the Convention—a treaty acceded to by the United States as well as by Indonesia. That such disregard for the judicial decisions of a co-equal signatory to the New York Convention resulted from the application of a legal presumption unsupported by the Convention's text seriously undermines the Convention's foundational principle of international comity.

The Fifth Circuit's decision to confirm KBC's arbitral award raises the question whether the parties' choice of arbitral law—and, by extension, the place of primary jurisdiction under the New York Convention—should be determined according to a presumption in favor of the place where the arbitral proceedings will be held that can be rebutted only if the parties designate another law expressly. This question presents an independent basis for review, in addition to Pertamina's arguments (endorsed by the Republic) that the Fifth Circuit incorrectly confirmed an arbitral award rendered by a tribunal constituted contrary to the parties' intent. Pet. i, 15–17. The Republic exclusively addresses this choice of law question in the accompanying brief.[2]

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[2] Although the Court does not "ordinarily address issues raised only by *amici*," *Kamen v. Kemper Fin. Serv., Inc.*, 500 U.S. 90, 97 n.4 (1991), it has done so before. *See generally Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 37–38 (1991) (Stevens, J., dissenting) (discussing cases where the Court has addressed issues not presented in the petition for certiorari). The Court should consider the choice of law question raised by the Republic here, because that question presents decisional conflicts on an important question of federal law and implicates serious issues of U.S. foreign relations. Unlike the situation in *Knetch v United States*, 364 U.S. 361, 370 (1960) and related decisions, this question was fully briefed by the parties below (and by the Republic appearing as *amicus curiae*) and addressed by the Fifth Circuit in its opinion. Pet. App. 15a–26a.

Accordingly, the Republic's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.[3]

STATEMENT

This case arises out of proceedings brought by Respondent Karaha Bodas Company L.L.C. ("KBC") against Petitioner PT Pertamina (Persero) ("Pertamina") under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *codified in* the Federal Arbitration Act at 9 U.S.C. §§ 201–208 ("New York Convention" or "Convention"), to confirm an arbitral award now totaling approximately $300 million.

Statutory Background. The New York Convention's "carefully structured framework for the review and enforcement of international arbitral awards," Pet. App. 12a, rests on a key distinction between courts of primary and secondary jurisdiction. "Under the Convention, 'the country in which, or under the [arbitration] law of which, [an] award was made' is said to have primary jurisdiction over the arbitration award. All other signatory states are secondary jurisdictions, in which parties can only contest whether that state should enforce the arbitral award." *Id.* at 13a (quoting *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 364 (5th Cir. 2003) (footnotes omitted)). Primary jurisdiction is determined by "'the regimen or scheme of arbitral procedural law under which the arbitration was conducted, and not the substantive law . . . applied in the

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[3] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* Republic of Indonesia hereby affirms that no counsel for a party authored this brief in whole or part and that no one besides the Republic and its counsel made a monetary contribution to the preparation and submission of this brief.

case.'"[4] *Id.* at 17a (quoting *Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Indus. Y Comercial*, 745 F. Supp. 172, 178 (S.D.N.Y. 1990)). Because only a court of primary jurisdiction can annul an arbitral award, the parties' choice of law governing the arbitration (*i.e.*, the *lex arbitri*) is perhaps the central question for enforcement proceedings under the Convention. *See* W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 116 (1992) (describing the distinction between primary and secondary jurisdiction as "central to the control system of the New York Convention").

The Agreements Between Pertamina and KBC. In November 1994, KBC and Pertamina entered into two contracts for the development of geothermal power in the Republic of Indonesia ("Republic"). The Joint Operation Contract ("JOC"), signed by KBC and Pertamina, concerned the development of geothermal energy in the West Java region of Indonesia. The Energy Sales Contract ("ESC"), entered into by KBC, Pertamina, and PT PLN (Persero) ("PLN"), Indonesia's state-owned electric utility, governed the sale to PLN of electricity produced from geothermal energy at facilities constructed by KBC.

The arbitration clauses in the JOC and ESC incorporated certain provisions of Indonesian arbitration law and modified the parties' rights thereunder. Among other things, the parties waived their rights under the Indonesian Code of Civil Procedure to the arbitrators' term limit, the time for completing the arbitration, and a judicial appeal from the arbitral panel's decision. Pet. App. 19a n.31 (discussing references to Indonesian law in the JOC and ESC). By incorporating these references, the parties indicated their choice of Indonesian law to govern

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[4] It is undisputed that the parties selected Indonesian substantive law to govern the merits of the arbitration. Pet. App. 18a.

the arbitration, notwithstanding their selection of Switzerland as the place of the arbitration proceedings.

The Arbitration Proceedings. Upon suspension of the JOC and ESC projects by presidential decree as a result of the economic crisis that swept Asia in the 1990s, KBC initiated a single arbitration against Pertamina and PLN for the alleged breach of both contracts. The arbitral tribunal awarded KBC approximately $261 million plus judgment interest for costs and lost profits. *Id.* at 8a. As one of several enforcement actions around the world, KBC brought the present action to confirm the arbitral award pursuant to the New York Convention in the U.S. District Court for the Southern District of Texas.

Judicial Proceedings in the U.S. and Indonesia. KBC's motion for summary judgment to confirm the award was granted on December 4, 2001. *Id.* at 56a–90a. Pertamina appealed to the U.S. Court of Appeals for the Fifth Circuit, which affirmed the district court judgment in an opinion dated March 23, 2004. *Id.* at 1a–55a.

Before the Fifth Circuit could decide the appeal, the Central Jakarta District Court ("Jakarta Court") issued an order in April 2002 holding that it had jurisdiction under Article 67(1) of Indonesia's new Arbitration Law No. 30/1999 to hear Pertamina's application for annulment of the award under the New York Convention. In August 2002, after full briefing and hearing, the Jakarta Court ordered the award annulled. The court held that (1) the JOC and ESC indicated the parties' intent that Indonesian law would govern the arbitration; (2) Indonesia was the primary jurisdiction to set aside or annul the award within the meaning of Article V(1)(e) of the New York Convention, and Indonesian law authorized the court to do so; (3) the award was annulled, pursuant to Article V(2)(b) of the Convention, because it violated Indonesian public policy by holding Pertamina liable for the suspension of projects governed by the JOC and ESC

despite the nature of that suspension as *force majeure* under Indonesian law.

The Republic appeared before the Fifth Circuit as *amicus curiae* in support of Pertamina's appeal. Both the Republic and Pertamina argued that the award should not be enforced, among other reasons, because it had been set aside by the Jakarta Court. Pet. App. 2a n.3 ("One of the issues before this panel is whether the Indonesian court's order is a defense to the enforcement of the Award."). In particular, the Republic argued that, as a matter of federal common law, Indonesian law governed the arbitration because of the parties' references to Indonesian arbitration law in the JOC and ESC. Given that evidence of the parties' intent, the Republic argued that the award was rendered under the law of Indonesia. The Republic further argued, based on the language of Article V(1)(e), "that the New York Convention permits more than one country to have primary jurisdiction over an arbitration award." *Id.* at 51a. Accordingly, the Republic maintained that Indonesia, and thus the Jakarta Court, had primary jurisdiction and that that court's decision "provid[es] a defense to enforcement in the United States." *Id.* at 17a–18a.

The Fifth Circuit rejected the Republic's choice of law analysis. Rather than looking to the parties' agreements and conducting a choice of law analysis under federal common law to determine the parties' choice of law governing the arbitration, the Court of Appeals relied on a textually unsupported "strong presumption" purportedly under the New York Convention "that designating the place of the arbitration also designates the law under which the award is made." *Id.* at 22a. The court emphasized that "an express designation of Indonesian procedural law [would be] necessary to rebut" this presumption. *Id.* Reasoning that the multiple references to Indonesian law in the contracts "fall far short" of the "express designation" required to rebut the

presumption, *id.* at 21a–22a, the Fifth Circuit concluded (based on this presumption) that the parties' selection of Switzerland as the place of the arbitration proceedings meant that Switzerland has primary jurisdiction under the New York Convention to annul the arbitral award. *Id.* While acknowledging that the language of Article V(1)(e) "suggests the potential for more than one country of primary jurisdiction," the Fifth Circuit nonetheless held that "the predominant view is that the Convention permits only one in any given case." *Id.* at 51a–52a. For these reasons, the Court of Appeals concluded that only "Swiss procedural law applied," *id.* at 18a, and declined to recognize the Jakarta Court's decision annulling the award. *Id.*

SUMMARY OF ARGUMENT

Review should be granted for several reasons in addition to those set forth in the petition. The Fifth Circuit's decision conflicts with this Court's precedents and with decisions of other federal circuits concerning the correct rule to identify the place of primary jurisdiction under the New York Convention. Moreover, those conflicts arise from a holding—that the law governing an arbitration and, by extension, the place of primary jurisdiction is determined by an inflexible presumption in favor of the law of the place where the arbitral proceedings will be held—not supported by the Convention's text or precedent. By declining to apply a reasoned choice of law analysis and recognize as a result of that analysis the valid judgment of an Indonesian court that properly exercised primary jurisdiction under the Convention, the decision below presents an affront to the Republic of Indonesia that undermines the principle of international comity on which the Convention's structure is built. Such an affront implicates serious issues of U.S. foreign relations and thus presents another reason to grant review.

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS HOLDING THAT COURTS MUST ENFORCE ARBITRATION AGREEMENTS ACCORDING TO THEIR TERMS

1. Review is merited because the Fifth Circuit's decision conflicts with this Court's precedents emphasizing that the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ("FAA"), requires a court to enforce arbitral agreements according to their terms. *See, e.g.*, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (holding that "courts are bound to interpret contracts in accordance with the expressed intentions of the parties—even if the effect of those intentions is to limit arbitration"); *Volt Info. Sci., Inc. v. Bd. of Trustees*, 489 U.S. 468, 478 (1989) (holding that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (stating that "as with any other contract, the parties' intentions control").[5]

This Court has explained that enforcing the parties' intent implements "the central purpose" of the FAA. *Mastrobuono*, 514 U.S. at 53–54; *accord Volt*, 489 U.S. at 478 (describing "Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms"). Indeed, the Court has long adhered to the principle of enforcing arbitration

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[5] In its willful refusal to apply the correct choice of law rule and its apparent bias toward foreign law, the decision below resembles *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975) (per curiam). There the Court summarily reversed a Fifth Circuit decision that refused to apply the controlling Texas choice of law rule, in part, because it would require the application of Cambodian law. *Id.* at 4.

agreements according to their terms, even when that principle appeared to conflict with other strong federal policies. *See, e.g.*, *id.* at 479 ("Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward."); *Mitsubishi* at 636 ("[W]here the international cast of a transaction would otherwise add an element of uncertainty to dispute resolution, the prospective litigant may provide in advance for a mutually agreeable procedure whereby he would seek his antitrust recovery as well as settle other controversies."). Enforcing arbitration agreements according to their terms harmonizes these apparently clashing aims by permitting courts to "give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA." *Volt*, 489 U.S. at 479.

Such an unwavering focus on the terms of an arbitration agreement follows from the axiom that "[a]rbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Id.* The Court has expressly recognized that this principle of party autonomy extends to the choice of law. *Id.* ("Just as [the parties] may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted."). Identifying which jurisdiction's law the parties chose to govern the arbitration thus "comes down to what the contract has to say." *Mastrobuono*, 514 U.S. at 58.

2. Plenary review is warranted because the Fifth Circuit's decision contradicts this Court's precedents in *Mastrobuono*, *Volt*, and *Mitsubishi*. The Court of Appeals did not simply enforce the JOC and ESC, "like other contracts, in accordance with their terms." *Volt*, 489 U.S.

at 478. Instead, the court applied a "strong presumption that designating the place of the arbitration also designates the law under which the award is made." Pet. App. 22a. By design, this presumption misdirects a court away from "giv[ing] effect to the contractual rights and expectations of the parties." *Volt*, 489 U.S. at 479. Moreover, the Fifth Circuit fortified this untenable presumption by requiring "an *express designation* of Indonesian procedural law" as the only effective form of rebuttal. Pet. App. 22a (emphasis added). On that basis, the Court of Appeals managed to trivialize or dismiss the parties' incorporation of Indonesian arbitration law in the JOC and ESC, concluding that such references "fall far short" of rebutting the presumption and establishing Indonesia as the place of primary jurisdiction under the New York Convention. *Id.* Because the Fifth Circuit's all-but-irrebuttable presumption requires a court to disregard the terms of the parties' agreement when deciding the central question of primary jurisdiction, the conflict with this Court's precedents under the FAA could not be sharper.[6]

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[6] The Fifth Circuit's holding that "[j]udicial estoppel provides an additional ground for concluding that Swiss procedural law applied to the arbitration proceeding," Pet. App. 26a, does not provide an uncontroversial basis on which "to decide the case on another ground and thus not reach the point upon which there is conflict." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 231 (8th ed. 2002). Judicial estoppel requires a showing that a party's statements are "clearly inconsistent," Pet. App. 25a, or mired in "'intentional self-contradiction.'" *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001) (quoting *Scarano v. Cent. R.R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953)). Pertamina's statements regarding the applicability of Swiss and Indonesian law are neither clearly inconsistent nor intentionally self-contradictory. Switzerland and Indonesia both meet the test of a primary jurisdiction under Article V(1)(e), and the Fifth Circuit itself recognized that the New York Convention "suggests the potential for more than one country of primary jurisdiction." Pet. App. 51a–52a. Until the court decided "that the Convention permits only one [primary jurisdiction] in any given case," the question was one of first impression on which scholarly opinion was divided. *See id.* at 52a &

II. THE FIFTH CIRCUIT'S DECISION PRESENTS A CONFLICT IN PRINCIPLE WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS

Review is warranted because the Fifth Circuit's decision presents a conflict in principle with decisions of the First and Second Circuits on the question of whether federal common law governs the choice of law under the New York Convention. The Fifth Circuit decided which law governed the arbitration by applying "the strong presumption that designating the place of the arbitration also designates the law under which the award is made." Pet. App. 22a. The Court of Appeals purported to find this presumption "[u]nder the New York Convention," but cited only commentary and not any language in the Convention itself. *Id.* at 19a–20a & n.32. Based on its "strong presumption," the court rejected the argument by Pertamina and the Republic "that the district court should have conducted a choice of law analysis to determine the law that would apply to the interpretation of the parties' contracts," *id.* at 22a, and thereby their intended choice of governing law. Instead, the Fifth Circuit concluded that "the parties presumptively chose Swiss procedural law as the *lex arbitri* when they designated Switzerland as the site of the arbitration, and that presumption is unrebutted." *Id.* at 22a–23a (footnote omitted).

The First Circuit took a contrary approach in *InterGen N.V. v. Grina*, 344 F.3d 134 (1st Cir. 2003). There the Court of Appeals applied federal common law to decide under the New York Convention whether nonsignatories to arbitration agreements could compel the arbitration of certain claims against them. *Id.* at 143. The court held

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n.123. Because the application of judicial estoppel on this record is dubious, this Court may reach the choice of law question presented by the Republic.

that "[t]his is a federal question case . . . and we therefore look to federal choice of law principles." *Id.* Further, the court approached the task of devising a rule of decision "mindful that federal common law incorporates general principles of contract and agency law." *Id.* at 144.

Similarly, the Second Circuit decided under the New York Convention that assignments made after the effective date of agreements containing arbitration clauses did not deprive the assignees of the right to compel arbitration. *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 95 (2d Cir. 1999). Like the First Circuit, the Second Circuit had no difficulty concluding that federal common law applied: "When we exercise jurisdiction under Chapter Two of the FAA, we have compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable." *Id.* at 96. Again like the First Circuit, the Second Circuit looked to "'ordinary principles of contract and agency.'" *Id.* at 97 (quoting *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 524 (2d Cir. 1980)).

The Fifth Circuit's decision conflicts in principle with *InterGen* and *Smith/Enron* with respect to whether federal common law governs the determination of the parties' choice of governing arbitral law under the New York Convention. Where the Fifth Circuit declined to conduct a choice of law analysis, the First and Second Circuits conducted one. Even more significantly, where the Fifth Circuit concluded that the Convention itself supplied the correct source of law, in the form of a legal presumption in favor of applying the law of the place of the arbitration proceedings, the First and Second Circuits adopted federal common law and looked to traditional principles of contract and agency law.

This conflict over the correct choice of law rule under the New York Convention is outcome-determinative in this case. As explained in greater detail below, applying a

federal common law choice of law analysis under the Restatement would have led the Fifth Circuit to conclude that Indonesian law governs any arbitration under the JOC and ESC. Given that conclusion, the Court of Appeals would have had to deny confirmation of the arbitral award in the United States based on the Jakarta Court's order annulling the award.

III. THIS CASE INVOLVES A QUESTION OF NATIONAL IMPORTANCE

The choice of law question presented by the Republic is an issue of national importance that only this Court can finally resolve. The importance of the question presented has been noted as the sole reason prompting review in a previous New York Convention case. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974).

Deciding the correct choice of law rule used to identify the law governing an arbitration agreement is intrinsically important by virtue of the central role played by the distinction between primary and secondary jurisdiction under the New York Convention. REISMAN at 116 ("The distinction between primary and secondary jurisdictions is, in my view, central to the control system of the New York Convention and has been an important reason for the attractiveness of the regime to its various consumers."). This question substantially determines the rights of the parties to enforce or resist enforcement of the arbitral award. Pet. App. 12a–15a (explaining the distinction between primary and secondary jurisdiction under the Convention and the effect of that distinction on the rights of arbitral parties).

Deciding the choice of law rule to identify the law governing an arbitration holds great practical importance given the growing use of international arbitration. *Mitsubishi*, 473 U.S. at 638 ("As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the

course of that trade."). Arbitration now provides the "normal, rather than alternative, way of settling international commercial disputes." Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35, 39 (2003). "[S]tatistics from twelve of the major clearinghouses for arbitration show that the number of cases submitted to international arbitration almost doubled between 1992 and 2000." Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 441 (2003). This trend toward international arbitration includes many cases (like this one) where at least one of the parties is a foreign state or state-owned entity. *See, e.g., 2003 Statistical Report*, 15 ICC INT'L COURT OF ARBITRATION BULLETIN No. 1, Spring 2004 (stating that in 2003, foreign states and state-owned entities were parties to 11% of cases registered before the International Chamber of Commerce International Court of Arbitration).

The New York Convention has played a lead role in this development. More than 70% of the world's nations have acceded to the Convention,[7] and "dispute resolution by nonstate entities, backed up by enforcement in national courts under the New York Convention, is now an essential part of the global dispute resolution system." Martinez at 441.

IV. THE NEW YORK CONVENTION DOES NOT SUPPORT A PRESUMPTION IN FAVOR OF THE LAW OF THE PLACE WHERE THE ARBITRAL PROCEEDINGS ARE HELD

The Fifth Circuit's decision below—"that designating the place of the arbitration also designates the law under

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[7] Out of 192 independent nation-states in the world, U.S. Dept. of State, Fact Sheet, "Independent States in the World," *available at* http://www.state.gov/s/inr/rls/4250.htm (last visited July 19, 2004), 135 nations have acceded to the Convention. *See* N.Y. Convention.

which the award is made," Pet. App. 22a—not only presents multiple decisional conflicts that warrant review, but the decision is incorrect. The presumption in favor of the law of the place of the arbitral proceedings applied by the Court of Appeals is unsupported by the language or precedent of the New York Convention. By applying this presumption, the Court of Appeals managed to avoid a necessary choice of law analysis. If the court had applied a correct federal common law choice of law rule, the court would have concluded that Indonesian law supplies the governing law under the contracts. Moreover, the Fifth Circuit's presumption effectively deprived Pertamina of a lawful and complete defense to confirmation of KBC's arbitral award.

1. Here, "the district court had secondary jurisdiction" within the meaning of the New York Convention. *Id.* at 13a. That authority required the court to refuse enforcement based on any of "the grounds specified in Article V," *id.* at 14a–15a,[8] including when

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[8] The duty not to enforce an award set aside by a court of primary jurisdiction is obligatory. *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194, 197 (2d Cir. 1999) (declining to construe Article V(1)(e)—"[r]ecognition and enforcement of the award may be refused," N.Y. Convention art. V(1)—as imposing a permissive duty under which arbitral awards can be confirmed "notwithstanding the Nigerian judgments vacating them"); *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 318 (2d Cir. 1998) (stating that "under Article V of the Convention, an award should not be enforced if it is set aside or suspended in the originating country"); *accord* REISMAN at 114 (stating that "once an award has been set aside in a primary jurisdiction, it is not supposed to be enforceable anywhere else"); Albert Jan van den Berg, *When Is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, 6 PACE L. REV. 25, 42 (1985) (stating that "if the arbitral award has been set aside in the country of origin, foreign courts are bound by that decision. In that case they must refuse recognition and enforcement of the award."). However, on this point the Second Circuit conflicts with the decision below and the Eleventh Circuit. *See* Pet. App. 17a; *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr S.A.*, Nos. 02-16794, 03-13418, 2004 WL 1615611, slip op. at 17 n.6 (11th Cir. July 22, 2004).

the arbitral award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." N.Y. Convention art. V(1)(e).

Pertamina and the Republic argued that the decision of the Jakarta Court annulling the arbitral award provides a valid defense to confirmation of the award. They pointed out that Article V(1)(e) vests primary jurisdiction in two places: "the country in which . . . that award was made" and "the country . . . under the law of which, that award was made." *See* Pet. App. 51a (quoting N.Y. Convention art. V(1)(e)); *accord M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 849 (6th Cir. 1996) (holding that "a motion to vacate may be heard only in the courts of the country where the arbitration occurred or in the courts of the country whose *procedural* law was specifically invoked in the contract calling for arbitration of contractual disputes"). Because the JOC and ESC contain no choice of law clause designating the source of governing law expressly, Pertamina and the Republic insisted that the district court should have applied a federal common law rule under Section 187 of the Restatement (Second) of Conflict of Laws and inferred from numerous references to the Indonesian Civil Procedure Code (including the arbitration law) in the JOC and ESC's arbitration provisions that the contracting parties intended Indonesian law to govern any arbitration arising from those contracts. Pet. App. 19a.

2. The Fifth Circuit disagreed. Despite its limited authority under the New York Convention as a court of secondary jurisdiction, the Court of Appeals declined to recognize the validity of the Jakarta Court's decision annulling the arbitral award on the basis of a legal presumption that lacks any support in the language of the Convention.[9] Unmoored from the language of the

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[9] *Scherk* does contain dicta that "[u]nder some circumstances, the designation of arbitration in a certain place might also be viewed as

Convention, this presumption violates the first rule of treaty interpretation that a court must "begin 'with the text of the treaty and the context in which the written words are used.'" *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct. for S. Dist. Iowa*, 482 U.S. 522, 534 (1987) (quoting *Air France v. Saks*, 470 U.S. 392, 397 (1985)). The Fifth Circuit cited no case law in support of its presumption, Pet. App. 20a n.32, and relevant decisions run contrary to that presumption. *See Mitsubishi*, 473 U.S. at 625 (rejecting a "presumption against arbitration of statutory claims"); *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 21 n.3 (2d Cir. 1997) (recognizing that the New York Convention permits parties to elect a governing law other than that of the state where arbitral proceedings are held). Commentaries cited by the Court of Appeals offer only tepid support for its presumption: most of them characterize an agreement to conduct arbitration in one country but applying the law of another country as unusual without inferring that there is a legal presumption against such an agreement mandated by the Convention.[10] Pet. App. 20a. Indeed, commentators

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implicitly selecting the law of that place to apply to that transaction." 417 U.S. at 519 n.13. However, the Court has never reiterated or followed this statement. On the contrary, since deciding *Scherk* the Court has repeatedly held that arbitration agreements must be enforced according to contract principles, *see, e.g.*, *Volt*, 489 U.S. at 476, an interpretive rule that forecloses the application of any presumption that would defeat the parties' intent.

[10] Two of the commentaries cited by the Fifth Circuit do rely on a legal presumption equating the place of an arbitration with the application of that nation's procedural law. *See* MICHAEL J. MUSTILL & STEWART C. BOYD, COMMERCIAL ARBITRATION 64 (2d ed. 1989); Martin Hunter, *Case and Comment: International Arbitration*, [1988] LLOYD'S MAR. & COMM. L.Q. 23, 26. However, the force of the English precedent on which these sources rely is diminished by other English decisions holding that the parties' choice of procedural law may be "inferred from the choice of seat *or from the other terms and circumstances of the transaction.*" MUSTILL & BOYD at 65 (citing *James Miller & Partners Ltd. v. Whitworth St. Estates*, [1970] 1 Lloyd's Rep.

recognize that the place of the arbitration proceedings can be chosen for the sake of convenience and not to provide the governing law. *See* HAMID G. GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 107–08 (2002) (discussing the trend that has reduced the importance of the place of arbitration as a "seat" because it "is chosen by the parties and arbitral institutions mainly based on commodity or logistic related considerations").

3. The Fifth Circuit's "strong presumption" in favor of the law of the arbitral forum is no substitute for a reasoned choice of law analysis under the federal common law; it is simply a device for avoiding such an analysis. Because the Court of Appeals could not identify what arbitral law applies and, by extension, the place of primary jurisdiction without conducting a threshold choice of law analysis, such an analysis was unavoidable. By failing to conduct a reasoned choice of law analysis, the court defaulted on its fundamental duty to "identify and apply the proper construction of governing law." *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991).

If the Fifth Circuit had conducted a choice of law analysis, it would have applied federal common law which, in turn, would have led the Court of Appeals to the Restatement (Second) of Conflict of Laws. *See, e.g., Curtin v. United Airlines, Inc.*, 275 F.3d 88, 93 n.6 (D.C. Cir. 2001) (stating in a case under the Warsaw Act that "[c]ourts also often look to the U.C.C. and Restatement when deciding questions of federal common law"). Section 218 of the Restatement (Second) of Conflict of Laws

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269 (1970) (emphasis added). The leading commentator on the New York Convention has written that this presumption would only apply absent "any indication" in the arbitration agreement of another law governing the arbitration. ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 292–93 (1981) (discussing the term "failing any indication thereon" under the New York Convention in the context of Articles V(1)(a) and (e)).

addresses the "Validity and Effect of Arbitration Agreement" and provides that the rights created by an arbitration agreement are determined by reference to the choice of law principles set forth in Section 187. Under Section 187, "[t]he law of the state chosen by the parties to govern their contractual rights and duties" under their agreement will be applied. Restatement (Second) of Conflict of Laws § 187. The parties' choice of law governing that agreement need not be express: "the fact that the contract contains legal expressions, or makes reference to legal doctrines, that are peculiar to the local law of a particular state may provide persuasive evidence that the parties wished to have this law applied." *Id.* § 187, cmt. a.

Here, the JOC and ESC arbitration agreements not only incorporate numerous provisions of Indonesian civil procedure, those references purport to alter the ordinary effect of Indonesian law. Pet. App. 19a n.31. These provisions were peculiar to Indonesian law and foreign to Swiss law. Under Section 187, the Fifth Circuit should have concluded that KBC and Pertamina chose Indonesian law to govern their arbitration.

4. The Fifth Circuit's disregard for the parties' incorporation of Indonesian law and application of an unfounded presumption in favor of Swiss law deprived Pertamina of a lawful and complete defense to confirmation of KBC's arbitral award. The FAA and the New York Convention "recognize a party's right to *object* to confirmation *on specified grounds*." *M & C Corp.*, 87 F.3d at 849. Article V(1)(e) specifically entitles a party to challenge confirmation in a court of secondary jurisdiction based on an order from a court of primary jurisdiction setting aside the arbitral award. N.Y. Convention art. V(1)(e). The decision below deprived Pertamina of a defense that the New York Convention expressly provides, based on a purported presumption with no basis in the text of the Convention.

V. THE FIFTH CIRCUIT'S DECISION VIOLATES THE PRINCIPLE OF INTERNATIONAL COMITY AND IMPLICATES SERIOUS ISSUES OF FOREIGN RELATIONS

The Fifth Circuit's incorrect choice of law analysis led the court to violate the principle of international comity by failing to defer to the Jakarta Court's decision annulling KBC's arbitral award. *See Diorinou v. Mezitis*, 237 F.3d 133, 142 (2d Cir. 2001) ("American courts will normally accord considerable deference to foreign adjudications as a matter of comity."). This Court has "long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation" and has enjoined courts to "take care to demonstrate due respect . . . for any sovereign interest expressed by a foreign state." *Société Nationale*, 482 U.S. at 546. Yet the Court of Appeals failed to accord the Republic such respect when it disregarded the parties' choice of governing law and treated the Jakarta Court's decision as a legal nullity, based on an unfounded presumption that misidentified Switzerland as the place of primary jurisdiction.

This violation of international comity undermines the structure of the New York Convention. The Fifth Circuit's results-driven presumption in favor of the place of the arbitration proceedings and bias against Indonesian law invites reciprocal disrespect for U.S. judgments abroad. *See Gau Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992) (where U.S. courts fail to recognize the jurisdiction of foreign courts, "[f]oreign courts can be expected to reciprocate such disrespect."). Without mutual recognition of valid foreign judgments, the New York Convention's central distinction between primary and secondary jurisdiction will fall apart.

Failing to recognize the Jakarta Court's judgment also presents an affront to the Republic that threatens to impair U.S. foreign relations. *Cf. Verlinden, B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States . . . ."). Such a detrimental effect on this country's foreign relations furnishes an additional reason to grant review. *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002) (granting review, in part, because the Second Circuit's decision "implicates serious issues of foreign relations").

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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